86-602

In The
Supreme Court of the United States
October Term, 1986

PEARSON TRUCKING AND RIGGING, INC.,

Petitioner,

—*vs.*—

JOSEPH HICKS, dba HICKS ENGINEERING CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

1. Pursuant to the Carmack Amendment of the Interstate Commerce Act, can an interstate carrier waive—or be estopped from asserting—a bill of lading's nine-month time limitation provision in which a shipper must make a claim for damages?

2. If an interstate carrier can be estopped from asserting a bill of lading's time limitation provision, then can estoppel be found to exist when the shipper expressly admits he did not rely upon any statements made by the carrier as to whether or not a timely claim need be made?

3. If a shipper fails to give a carrier notice of those special circumstances from which special damages might flow, then can the Nevada State Courts—contrary to the recent ruling of the United States Court of Appeals for the Ninth Circuit—allow the shipper to recover special damages?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioner, Pearson Trucking & Rigging, Inc., BHY Trucking, Inc., Engineering Company.

The parties before this Court include the Petitioner, Pearson Trucking & Rigging, Inc., and the respondent, Joseph Hicks, dba Hicks Engineering Company. BHY Trucking, Inc. has filed a Motion for Leave to Join as a Party Petitioner with Pearson's Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada. Roy L. Barrow is not a party before this Court.

Pursuant to Rule 28.1, Petitioner, Pearson Trucking & Rigging, Inc., states it has one subsidiary—PTNR Corp.

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OCTOBER TERM 1986

PEARSON TRUCKING and
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vs.

JOSEPH HICKS, dba
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Respondent.

_____/

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

The Petitioner, PEARSON TRUCKING AND RIGGING, INC., respectfully requests that a Writ of Certiorari be issued to review the Opinion of the Supreme Court of the State of Nevada entered in this proceeding on June 26, 1986.

OPINION BELOW

The Nevada Supreme Court's Opinion, reported at 102 Nev.Adv.Op. 75, 720 P.2d 1229, (1986) appears in the Appendix.

JURISDICTION

The Nevada Supreme Court's Opinion was entered on June 26, 1986. Another party to that appeal (Roy L. Barrow) filed a timely Petition for Rehearing involving issues unrelated to those raised by this Petition for Writ of Certiorari. The Nevada Supreme Court denied that Petition for Rehearing on September 4, 1986. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS AND FEDERAL REGULATIONS INVOLVED

United States Code, Title 49:

§11707(e)-found at p. 1553 of Supplement III to the 1976 edition.

" A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice."[1]

49 Code of Federal Regulations, part 1043.2, found at pp. 119-120.

(Due to the length of this regulation, this regulation is set forth verbatim in the attached appendix.)

[1]49 U.S.C. §11707 replaced 49 U.S.C. 20(11). 49 U.S.C. 20(11) was repealed as of October 17, 1978. However, the language of the two statutes is virtually identical.

STATEMENT OF THE CASE

This action arose out of a series of incidents which allegedly occurred between February 27, 1978, and March 2, 1978. Joseph Hicks contended his milling machinery—while being transported from Burbank, California, to Reno, Nevada,—was exposed to the elements and became rusted. By virtue of this alleged rusty condition, Hicks contended his machines no longer met his standards of excellence. Consequently, he contended he lost business.

On or about February 27, 1978, Hicks entered into a contract with Pearson Trucking & Rigging Company, Inc.,—an interstate carrier—to have certain items of machinery transported from Burbank to Reno. Since Pearson did not have authority to transport items into the State of Nevada, Pearson agreed to have Hicks' machinery loaded in Burbank and unloaded in Reno. Pearson then subcontracted the actual transportation work to BHY Trucking Company, Inc., another interstate carrier. When the BHY trucks arrived in Reno, Hicks discovered his machinery had been damaged enroute by exposure to the elements.

When the machinery was delivered in Reno, Hicks received Pearson's bill of lading. This bill of lading provided that, as a condition precedent to recovery, a written claim for damage must be made within nine months of the date of delivery of the goods. (ROA, Vol. I, p. 14; ROA, Vol. II, p. 375, l. 17-31; ROA, Vol. III, pp. 68-70; Exhibit F in evidence.)

Hicks subsequently discussed the situation with Dick Culy of BHY. Culy stated an adjuster would be sent to help Hicks estimate the cost of any repairs that would need to be made. However, Hicks expressly admitted Culy at no time told him (Hicks) not to submit a timely written claim. (ROA, Vol. IV, p. 258, l. 9-17.) Hicks further admitted that Culy did not lead him (Hicks) to believe a written claim need not be timely filed. (ROA, Vol. IV, p. 248, l. 15-21.)

Hicks did not submit a written claim within nine months after his machinery had been delivered to Reno. (ROA, Vol. IV, p. 258, l. 18-21.)

After repairing his machinery, Hicks contended he nonetheless continued to lose business since the machines no longer met his

standards of excellence. He contended he worked in a different material (plastic) than other machinists; he contended he worked to tolerances that other machinists were unable to work to; he contended he was not "99 percent of the machinists in the world"; he contended he was "in the top 1 percent" of machinists; he contended the machines did not meet *his* standards of excellence. (ROA, Vol. III, p. 175, l. 28-30; p. 176, l. 1-3; p. 207, l. 1-3; Vol. VIII, p. 793, l. 5-10; p. 803, l. 1-4.) Thus, Hicks contended *he* should be entitled to an award of past and future lost profits even though other machinists who bought the machinery were using the machinery profitably and without problem.

However, Hicks never informed Pearson of his "special" skills. He never informed Pearson of his "special" work. He never informed Pearson of his "special" needs for these machines.

The jury returned a verdict in favor of Hicks and against both Pearson and BHY. (Under Federal Law, Pearson—as the initiating carrier—was responsible for the acts of BHY, the connecting carrier.) The jury awarded Hicks $155,000 in past damages and $195,000 in future damages.

HOW FEDERAL QUESTION IS PRESENTED

Pearson initially filed a Motion for Summary Judgment contending Hicks' claim was time barred since Hicks failed to make a claim for damages within the nine-month limitation provision contained in the bill of lading. The Nevada Supreme Court rejected that position and held a carrier can be estopped from asserting such a defense. *Hicks vs. BHY Trucking,* 99 Nev. 519, 665 P.2d 253 (1983).

At the completion of the trial on the merits, Pearson filed a "Motion for Judgment NOV, or in the Alternative, Motion for New Trial." In this Motion, Pearson contended that it could not be estopped from asserting this nine-month time limitation provision since—by Hicks' own trial admission—Hicks did not rely upon any carrier conduct to his detriment. In addition, Pearson contended it could not be held liable for special damages such as lost profits since Hicks failed to give Pearson notice of those special circumstances from which such damages might flow.

On appeal, the Nevada Supreme Court upheld the jury verdict. Notwithstanding Hicks' admission of lack of detrimental reliance,

the Nevada Supreme Court stated, "there was ample evidence to support a finding of estoppel..." The Court also held the evidence was sufficient to support the jury's award of damages.

REASONS FOR GRANTING THE WRIT
I.

AN INTOLERABLE CONFLICT EXISTS IN THIS COUNTRY AS TO WHETHER OR NOT AN INTERSTATE CARRIER CAN BE ESTOPPED FROM ASSERTING THE PROVISIONS OF A BILL OF LADING

The Interstate Commerce Act allows an interstate carrier to limit the time in which a shipper may make a claim for damages. 49 U.S.C. 11707(e). However, two of this Court's decisions have produced great confusion in this country as to whether or not a carrier can waive--or be estopped from asserting—the time-limitation provision contained in a bill of lading. Consequently, this country's interstate carriers are constantly being faced with conflicting rulings and findings on liability. In order to settle this confusion, Pearson respectfully submits it is imperative that this Court reaffirm its earlier decision that estoppel cannot be asserted against an interstate carrier. A contrary ruling—such as the one by the Nevada Supreme Court—would promote discrimination and antagonize the plain policy of the Interstate Commerce Act. Thus, Pearson respectfully submits it is imperative that this Court reverse the decision of the Nevada Supreme Court.

The purpose of the Interstate Commerce Act is to prevent discrimination in its various manifestations. *State of New York vs. United States,* 331 U.S. 284 (1947). To prevent such discrimination, this Court expressly ruled in *Georgia, Florida & Alabama Ry. Co. vs. Blish Co.,* 241 U.S. 190 (1916) that a carrier could not waive or be estopped from asserting the time limitation provision of a bill of lading.

> " But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; *nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsi-*

> *bility from that affixed by the agreement made under the published tariffs and regulations.* A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed." 241 U.S. at 197. (emphasis added)

Thus, this Court expressly held an interstate carrier could not be estopped from asserting a bill of lading's time limitation provision.

However, confusion has sprung forth in this country as a result of language contained in this Court's subsequent decision of *Chesapeake & O. Ry. Co. vs. Martin,* 283 U.S. 209 (1931). Although this Court reaffirmed its decision in *Blish* that a carrier could not be estopped from asserting a bill of lading's provision, this Court did state that "whether under any circumstances the shipper may rely upon that doctrine (estoppel) in avoidance of the time limitation clause of the bill of lading, we need not now determine." 283 U.S. at 222.

In light of the subsequent language, the Courts in this country—both federal and state—are split as to whether or not a carrier can be estopped from asserting a bill of lading's time limitation provision. The United States Court of Appeals for the Sixth Circuit—citing one of its earlier decisions—has just recently reaffirmed its position that a carrier cannot be estopped from asserting a bill of lading's provisions. *Ford Motor Co. v. Transport Indemnity Co.,* 795 F.2d 538 (6th Cir. 1986), cit. *B.A. Walterman Co. vs. Penn Railroad Co.,* 295 F.2d 627 (6th Cir. 1961). Other federal district Courts and state Courts have also refused to recognize estoppel in this context. *Clancy vs. Consolidated Freightways,* 186 C.R. 257 (Cal.App. 1982); *American Chicle Div. Warner Lambert vs. M/V Mayaguez,* 540 F.Supp. 166 (S.D. Tex. 1981); *Westhemeco Ltd. vs. New Hampshire Insurance Co.,* 484 F.Supp. 1158 (S.D. N.Y. 1980); *Shulman vs. Superior Trucking Co.,* 223 A.2d 407 (Conn.App. 1966).

As noted by the Sixth Circuit Court of Appeals in *B.A. Walterman Co. v. Penn Railroad Co.,* supra, "the carrier may not waive or be estopped to assert the requirements of the bill of lading as this would permit discrimination which is prohibited by law." 295 F.2d at 628.

However, looking at this Court's language in *Chesapeake & O. Ry. Co. vs. Martin*, supra, the United States Court of Appeals for the Third Circuit has recently held an interstate carrier can be estopped from asserting a bill of lading's time limitation provision. *Perini-North River Associates vs. Chesapeake & O. Ry. Co.*, 562 F.2d 269 (3rd Cir. 1977). At least two other Circuit Court of Appeals and one district Court have recognized estoppel may be available to a shipper. *Pathway Bellows, Inc. vs. Blanchette*, 630 F.2d 900 (2d Cir. 1980), ftn. 10, U.S. cert. den. at 450 U.S. 915[2]; *Wisconsin Packing Co. vs. Indiana Refrigerator Lines*, 618 F.2d 441 (7th Cir. 1980); ftn. 6, U.S. cert. den. at 449 U.S. 837[2]; *Consolidated Freight, etc. vs. Theodor Mfg. Corp.*, 516 F.Supp. 9 (C.D. Cal. 1981).

In light of the growing conflict that exists in this country, Pearson respectfully submits it is imperative that this Court clarify—and reaffirm—its position set forth in *Georgia, Florida and Alabama Railway Co. vs. Blish Co.*, supra. This nation's interstate carriers—involved in a billion-dollar industry—are facing conflicting decisions and conflicting judgments throughout this country based solely upon whether or not they have passed from one state into another or from one circuit Court of Appeal's jurisdiction to another. Consequently, this country's interstate carriers are in a state of confusion as to the validity of a bill of lading's provisions. Thus, Pearson respectfully requests this Court to grant this Petition for Writ of Certiorari so this conflict can be resolved. If the Nevada Supreme Court Decision is not reversed, the plain policy of the Interstate Commerce Act will be antagonized, and the door will be opened to carrier discrimination.

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[2]Although this Court denied cert. in these two cases, the issues presented by these two cases are different than the issues presented by the present action. In both *Pathway Bellows* and *Wisconsin Packing*, the question presented to this Court was what writing is sufficient to satisfy the written requirement for making a claim for damages. In neither case was the issue of whether or not a carrier can be estopped from asserting a bill of lading's time limitation provision presented. (In fact, in both *Pathway Bellows* and *Wisconsin Packing*, the Courts merely indicated—in dicta—that such estoppel may possibly be available. Neither case turned on the issue of estoppel, and thus, that issue was not presented to this Court.)

II.

IN THE ABSENCE OF DETRIMENTAL RELIANCE, A CARRIER CANNOT BE ESTOPPED FROM ASSERTING A BILL OF LADING'S PROVISIONS

If this Court should hold that a carrier can be estopped from asserting a bill of lading's time limitation provision, then Pearson respectfully submits it is imperative that this Court set forth guidelines as to when—and under what circumstances—estoppel can be found. If the Nevada Supreme Court's decision is allowed to stand, then a carrier will be estopped from asserting this time limitation provision even though the shipper did not detrimentally rely upon any conduct by the carrier. Such a holding would effectively render a bill of lading's time limitation provision meaningless.

At least two federal Courts have considered what elements a shipper must establish to rely upon the doctrine of estoppel. These Courts have held a shipper must show the carrier made some misleading representation concerning whether a claim must be made, *and* the shipper must show he relied upon the representation, thereby failing to file a timely written claim. *R.T.A. Corp. vs. Consolidated Rail Corp.*, 594 F.Supp. 205 (S.D. N.Y. 1984); *Foster Wheeler Energy, etc. vs. Daly Express*, 485 F.Supp. 268 (M.D.Pa. 1980)

Since estoppel is disfavored in the law, estoppel must be *clearly* established. *Brant vs. Virginia Coal & Iron Co.*, 93 U.S. 326 (1876). Estoppel cannot rest on mere inference. *Ward vs. Worthen Bank & Trust Co.*, 681 S.W.2d 365 (Ark. 1984); *Pries Steak Products vs. Balley's Tom Foolery, Inc.*, 717 F.2d 367 (7th Cir. 1983); *National Fire Ins. Co. vs. Eastern Shore Lab, Inc.*, 301 A.2d 526 (Del.App. 1973).

Although the Nevada Supreme Court stated in its opinion there was "ample evidence to support a finding of estoppel," this statement is incorrect. At trial, Hicks expressly admitted the carriers at no time told him not to file a timely written claim. (ROA, Vol. IV, p. 258, l. 9-17.) Hicks expressly admitted any communications he had with the carriers did not lead him to believe a written claim need not be timely filed. (ROA, Vol. IV, p. 248, l. 15-21.) Thus, by his own testimony, Hicks admitted he did not rely to his detriment upon any statements that may have been made.

Thus, estoppel simply cannot be applied to the present action. The element of detrimental reliance is missing. If the Nevada Supreme Court's decision is allowed to stand, then carriers throughout this country will simply never be able to rely upon a bill of lading's time limitation provision. A shipper could simply state the carrier is estopped from asserting that provision whether or not the shipper relied to his detriment upon any statements made by the carrier.

Since the present action is governed by federal law, *Perini-North River Associates vs. Chesapeake & O. Ry Co.*, supra, and since this Court has recognized reliance is necessary for estoppel, *Heckler vs. Community Health Services of Crawford Company, Inc.*, 467 U.S. 51 (1984), the Nevada Supreme Court's decision clearly runs contrary to federal law. In order to have this error rectified, and in order to set forth guidelines to be followed by this country's Courts, Pearson respectfully submits it is imperative this Court review—and reverse—the decision of the Nevada Supreme Court.

III.

SPECIAL DAMAGES ARE NOT RECOVERABLE IN THE ABSENCE OF NOTICE BEING GIVEN TO THE CARRIER

Finally, Hicks' jury award for lost profits must be stricken. Hicks failed to give any notice to Pearson of any special circumstances giving rise to such lost profits. Thus, as recently recognized by the United States Court of Appeals for the Ninth Circuit, such damages are not recoverable.

Under federal law, general damages may be awarded against a carrier if the damages were foreseeable to a reasonable man. *Hector Martinez & Co. vs. So. Pac. Transp. Co.*, 606 F.2d 106 (5th Cir. 1979). However, special damages are awarded *only* if the shipper gave the carrier notice of the special circumstances from which such damages would flow. *Contempo Metal Furniture Co. of Cal. vs. E. Texas Motor Freight Lines, Inc.*, 661 F.2d 761 (9th Cir. 1981). In *Contempo Metal Furniture Co. of Cal. vs. E. Texas Motor Freightlines, Inc.*, supra, the Ninth Circuit Court of Appeals set forth this general damage rule as follows:

> " The Carmack Amendment has not altered the common law rule that special, or consequential, damages are not usually

recoverable.... To recover special damages, the plaintiff must show that the carrier had notice of the special circumstances from which such damages would flow." 661 F.2d at 765.

The Ninth Circuit Court of Appeals then noted the purpose behind this rule is to enable the carrier to protect itself.

> " The purpose of this rule is to enable the carrier to protect itself from special damages by negotiating special contractual terms, declining the shipment, or taking special precautions to avoid the loss." 661 F.2d at 765.

In the present action, Hicks did not give any notice to Pearson of any special circumstances which would possibly create an ongoing lost-profit claim if Hicks' machinery was in any way damaged. The evidence at trial clearly established other machinists were able to use Hicks' machinery profitably and without any problem. (ROA, Vol. IV, p. 459, l. 1-30; p. 460, l. 1-22; p. 465, l. 12-30; p. 466, l. 1-26; ROA, Vol. V, p. 507, l. 11-28; p. 508, l. 10-25; p. 509, l. 22-30; p. 510, l. 1-2; ROA, Vol. V, p. 512, l. 15-19; p. 513, l. 6-30; p. 514, l. 1-8; ROA, Vol. V, p.532, l. 18-28; p. 558, l. 28-30; p. 559, l. 1-22.) Despite this uncontradicted testimony, Hicks nonetheless contended he should be entitled to lost profits since he was a "special" machinist who worked in a different material; who worked at tolerances other machinists were unable to work to; who was in the "top 1 percent" of machinists. (ROA, Vol. III, p. 175, l. 28-30; p. 176, l. 1-3; p. 207, l. 1-3; ROA, Vol. VIII, p. 793, l. 5-10; p. 803, l. 1-4.) Since Hicks never gave Pearson notice of his "special" skills and "special" needs for this machinery, Pearson was never in a position to protect itself. Pearson was never given an opportunity to decline the shipment, to take special precautions to avoid any loss, or to negotiate special contractual terms.[3]

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[3]Federal law requires motor carriers to maintain insurance. 49 U.S.C., §317. Pursuant to 49 CFR §1043.2, motor carriers must maintain security in the amount of $5,000 for loss or damage to property carried on any one motor vehicle, and $10,000 for loss or damage to property occurring at any one time and place.

Thus, in the absence of notice of "special" circumstances giving rise to a claim of special damages, a carrier is unable to protect itself from such a claim.

Since Hicks failed to give notice to Pearson of his "special" circumstances, Pearson cannot be held liable for such damages. Since the Nevada Supreme Court's decision conflicts with the recent decision from the Ninth Circuit Court of Appeals, Pearson respectfully requests it is imperative this Court resolve this conflict. If the Nevada Supreme Court's decision is allowed to stand, then carriers will be faced with almost unlimited liability for potential losses for which they have no notice and no opportunity to protect themselves.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the Judgment and Opinion of the Supreme Court of the State of Nevada.

DATED this 24th day of September, 1986.

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

BHY TRUCKING, INC.; ROY L. BARROW; J. B. ACTION, INC.; PEARSON TRUCKING AND RIGGING, INC.; MARVIN YEARWOOD; LEO WOOLARD, APPELLANTS, v. JOSEPH HICKS, DBA HICKS ENGINEERING CO., RESPONDENT.

No. 16688

June 26, 1986

Appeal from judgment and order denying motion to amend the judgment; Second Judicial District Court; Washoe County, James J. Guinan, Judge.

Affirmed in part; reversed and remanded in part.

Barker, Gillock & Perry and *Ken Bick,* Reno, for Appellants.

Leeder, Sferrazza & Zeh, Reno, for Appellants BHY Trucking and Roy L. Barrow.

Durney & Brennan, Reno, for Respondent.

OPINION

Per Curiam:

This is the second time these parties have been before this court. In Hicks v. BHY Trucking, 99 Nev. 519, 665 P.2d 253 (1983), this court reversed a summary judgment in favor of BHY Trucking, Inc., (BHY) and all other defendants. After trial on the merits, the district court entered judgment on a jury verdict in favor of Joseph Hicks, dba Hicks Engineering Co. (Hicks). BHY now brings this appeal.

Respondent Hicks contracted with appellant Pearson Trucking and Rigging, Inc. (Pearson) to transport heavy milling machinery from Burbank, California to Reno, Nevada. Pearson then contracted with BHY Trucking to have the machinery transported to Reno. The machinery was loaded onto BHY trucks, and Hicks was informed that the load would be delivered to Reno by the following day. The machinery did not arrive as expected; and, when the shipment did arrive, the machinery had been damaged by exposure to the elements caused by shredding of the plastic tarpaulins which had covered the machines during transit.

A number of issues are raised in this appeal. We find no merit in appellants' claims that Hicks' action was barred for failure to submit a timely claim. There is ample evidence to support a finding of estoppel under our ruling in *Hicks*, above. Likewise, there is evidence to support the jury's award of damages. It does appear, however, that the trial court erred in applying an incorrect rate of interest on the judgment.

The judgment entered by the district court totaled $350,000.00. The court awarded prejudgment interest at the rate of eight percent per annum on the amount of $155,000.00, which sum represented past damages. This rate was applied from the time of service of summons to the date of the judgment. The district court also awarded post judgment interest on this same amount ($155,000.00) at the rate of twelve percent per annum, applicable from the date of judgment until the judgment is paid. Finally, the district court awarded interest on the balance of the judgment ($195,000.00) at the rate of twelve percent per annum beginning with the date of the judgment and to be applicable until the judgment is paid. As the $155,000.00 award was necessarily for past damages, the $195,000.00 must be considered as an award for future damages.

The parties disagree regarding which statute should apply to interest calculations. Hicks contends that NRS 99.040[1] applies because the action arose out of his shipping contract. Pearson and BHY argue that NRS 17.130, the general statute on computation of interest on judgments, applies. For the following reasons, we agree with Pearson and BHY.

Initially, we note that NRS 99.040 provides for an interest rate "upon all money from the time it becomes due. . . ." The judgments

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[1]NRS 99.040 provides:

99.040 Interest rate when no express written contract.

When there is no express contract in writing fixing a different rate of interest, interest must be allowed at the rate of 12 percent per annum upon all money from the time it becomes due, in the following cases.

1. Upon contracts, express or implied, other than book accounts.
2. Upon the settlement of book or store accounts from the day on which the balance is ascertained.
3. Upon money received to the use and benefit of another and detained without his consent.
4. Upon wages or salary, if it is unpaid when due, after demand therefore has been made.

The provisions of this section do not apply to money owed for the construction or remodeling of a building pursuant to NRS 624.325.

awarded to Hicks have nothing to do with any amounts "due" under the terms of the shipping contract. Indeed, the interest award could not be ascertained by the court until after the jury rendered its verdict. There can, therefore, be no "due date" associated with the damages in this case. Since the damages awarded to Hicks do not relate to any sum due pursuant to a promise of performance under the shipping contract, NRS 99.040 is not relevant to interest payable on the judgment in favor of Hicks. *See* Paradise Homes v. Central Surety & Ins. Corp., 84 Nev. 109, 116, 437 P.2d 78, 83 (1968).

In Wilson v. Pacific Maxon, Inc., 102 Nev. 52, 714 P.2d 1001 (1986), we resolved an issue similar to the one presently at bar. We note the following language in the *Wilson* opinion:

> Wilson claims the damages awarded in this case were not contract damages because PMI sued to rescind the contract. Further, Wilson argues that PMI's original claims sounded in fraud, making the damages awarded tort damages to which NRS 17.130(2) applies. We disagree. A suit for rescission of a contract is a suit arising out of a contract to which NRS 99.040 applies. More importantly, in an earlier opinion in this case, we disposed of PMI's tort claims and remanded only the contract questions to the district court. [citation omitted] Therefore, NRS 99.040 governs the award of interest in this case.

102 Nev. 53-54, 714 P.2d at 1002.

Our decision in *Wilson* was based on an action for rescission, which is a remedy peculiar to contracts and not applicable to actions sounding in tort. In the present case, Hicks was seeking general damages rather than pursuing a remedy peculiar to an action *ex contractu* such as PMI elected to pursue in *Wilson*, above.

Additionally, Hicks' action against Pearson and BHY was for negligent performance of the shipping contract and did not arise from a specific promise or term in the contract. The damage caused to Hicks' machinery was the result of negligent application of the tarpaulins which were intended to protect the machinery from the elements in transit. The duty on the part of Pearson and BHY to use reasonable care in protecting the machinery from harm was imposed by law rather than through specific terms or promises under the shipping contract. We also observe that the action was pleaded in negligence as well as breach of contract. The entire action sounds in tort rather than breach of the specific terms

of the contract; the proper statute to apply for computing interest on the judgment is NRS 17.130.

Although it appears that the district court applied NRS 17.130 to determine interest on the judgement,[2] Pearson and BHY correctly contend that the lower court applied interest rates which only came into effect by virtue of two amendments of NRS 17.130 which became effective after Hicks filed his complaint. The 1979 amending statute provided that "the provisions of this act apply to all actions and proceedings filed on or after July 1, 1979." 1979 Nev. Stats. ch. 448, §6 at 831. The 1981 amending statute provides that the act will only apply "to all causes of action which arise after July 1, 1981." 1981 Nev. Stats. ch. 739, §6 at 1859. The complaint in this action was filed on February 9, 1979, before either of these amendments became effective. Thus, neither the 1979 nor the 1981 amendment of NRS 17.130 were intended to apply to this action. Arnold v. Mt. Wheeler Power Co., 101 Nev. 612, 707 P.2d 1137 (1985).

NRS 17.130(2) as it existed at the time the complaint in this action was filed provided: "2. When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment shall draw interest at the rate of 7 percent per annum from the time of entry of the judgment until satisfied." 1979 Nev. Stats. ch. 448, §2 at 830. This former version of the statute does not distinguish between pre-judgment interest and post-judgment interest; nor does it distinguish between past and future damages as the present version does. The statute merely provides for interest at

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[2]The current version of NRS 17.130 provides:

17.130 Computation of amount of judgment; interest.

1. In all judgments and decrees, rendered by any court of justice, for any debt, damages or costs, and in all executions issued thereon, the amount must be computed, as near as may be, in dollars and cents, rejecting smaller fractions, and no judgment, or other proceedings, may be considered erroneous for that omission.

2. When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest at the rate of 12 percent per annum from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest at that rate only from the time of the entry of the judgment until satisifed.

This statute was amended in 1979 changing, *inter alia*, the interest rate from seven percent per annum to eight percent per annum. 1979 Nev. Stats. ch. 448, §2 at 830. The statute was again amended in 1981 changing the interest rate from eight percent to twelve percent. 1981 Nev. Stats. ch. 739, §1 at 1858.

seven percent per annum starting with the date of entry of the judgment and ending upon payment. Therefore, we hold that the lower court's assessment of interest was incorrect and must be vacated and replaced with a rate of seven percent per annum assessed on the entire judgment ($350,000.00) beginning with the date of entry of the judgment until paid. Accordingly, we reverse this portion of the district court's ruling and remand for a modification of the judgment.

MOWBRAY, C.J.
SPRINGER, J.
GUNDERSON, J.
STEFFEN, J.
YOUNG, J.

§1043.2 Security for the protection of the public: Minimum limits.

(a) *Definitions.* (1) "Primary security" means public liability coverage provided by the insurance or surety company responsible for the first dollar of coverage.

(2) "Excess security" means public liability coverage above the primary security, or above any additional underlying security, up to and including the required minimum limits set forth in paragraph (b)(2) of this section.

(b)(1) Motor carriers subject to §1043.1(a)(1) are required to have security for the required minimum limits as follows:

(a)*Small freight vehicles:*[1]

Kind of equipment	Transportation provided	Minimum limits
Fleet including only vehicles under 10,000 pounds GVWR.	Commodities not subject to 49 CFR 1043.2(b)(2)(d).	$300,000

(b)*Passenger carriers*[1]

Kind of Equipment

Vehicle seating capacity	Effective dates	
	Nov. 19, 1983	Nov. 19, 1985
(1) Any vehicle with a seating capacity of 16 passengers or more	$2,500,000	$5,000,000
(2) Any vehicle with a seating capacity of 15 passengers or less.....	750,000	1,500,000

(2) Motor carriers subject to §1043.1(a)(2) are required to have security for the required minimum limits as follows:

[1]EDITORIAL NOTE: AT 48 FR 51780, Nov. 14, 1983, §1043.2(b)(1) was revised and at 49 FR 1991, Jan. 17, 1984, paragraph (b) under (b)(1) was revised with incorrect paragraph designations. ICC will correctly designate the paragraph by publishing a document in the FEDERAL REGISTER at a later date.

Kind of equipment	Commodity transported	July 1, 1983*	July 1, 1984*
(a) Freight Vehicles of 10,000 Pounds or More GVWR.	Property (non-hazardous)	$500,000	$750,000
(b) Freight Vehicles of 10,000 Pounds or More GVWR.	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons, or in bulk Class A or B explosives, poison gas (Poison A) liquefied compressed gas or compressed gas, or highway route controlled quantity radioactive materials as defined in 49 CFR 173.455.	1,000,000	5,000,000
(c) Freight Vehicles of 10,000 Pounds or More GVWR.	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (b) above or (d) below.	500,000	1,000,000
(d) Freight Vehicles Under 10,000 Pounds GVWR.	Any quantity of Class A or B explosives; any quantity of poison gas (Poison A); or highway route controlled quantity radioactive materials as defined in 49 CFR 173.455.	1,000,000	5,000,000

*NOTE: The effective date of the current required minimum limit in 49 CFR 1043.2(b)(2)(d) was January 6, 1983, in accordance with the requirements of Pub. L. 97-424, 96 Stat. 2097.

(3) Motor carriers subject to the minimum limits governed by this section, which are also subject to Department of Transportation limits requirements, are at no time required to have security for more than the required minimum limits established by the Secretary of Transportation in the applicable provisions of 49 CFR Part 387—Minimum Levels of Financial Responsibility for Motor Carriers.

(4) *Foreign motor private carriers of nonhazardous commodities.* Foreign motor private carriers of non-hazardous commodities subject to §1043.1(a)(1) are required to have security for the required minimum limits under the laws of the

States in which the carrier is operating under a certificate of registration.

(c) *Motor common carriers: Cargo liability.* Security required to compensate shippers or consignees for loss or damage to property belonging to shippers or consignees and coming into the possession of motor carriers in connection with their transportation service, (1) for loss of or damage to property carried on any one motor vehicle—$5,000, (2) for loss of or damage to or aggregate of losses or damages of or to property occurring at any one time and place—$10,000.

[47 FR 55944, Dec. 14, 1982, as amended at 48 FR 43333, Sept. 23, 1983; 48 FR 45775, Oct. 7, 1983; 48 FR 51780, Nov. 14, 1983; 49 FR 1991, Jan. 17, 1984; 49 FR 27767, July 6, 1984; 50 FR 40030, Oct. 1, 1985]

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 1986, 3 copies of the Petition for Writ of Certiorari was mailed, postage prepaid, to the following counsel of record at their last known business addresses as follows. I further certify that all parties required to be served have been served.

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Counsel for Petitioner

(2)

No. 86-602

In The
Supreme Court of the United States
October Term, 1986

PEARSON TRUCKING AND RIGGING, INC.,
Petitioner,

v.

JOSEPH HICKS, dba HICKS ENGINEERING CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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15 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petition is jurisdictionally out of time.

2. Whether an interstate carrier may be estopped from asserting the nine-month written claim requirement of a bill of lading as a condition precedent to the payment of a shipper's damage claim when by the carrier's own misconduct the shipper is misled into not filing a written claim.

3. Whether certiorari should be granted to review the sufficiency of the evidence establishing detrimental reliance for estoppel.

4. Whether certiorari should be granted to review the sufficiency of the evidence establishing the foreseeability of special damages.

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent hereby submits this brief in opposition to the Petition for a Writ of Certiorari.

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CITATIONS TO OPINIONS BELOW

1. *Hicks v. BHY Trucking,* 99 Nev. 519, 665 P.2d 253 (1983).

2. *BHY Trucking v. Hicks,* 102 Nev. — (Adv.Opn. 75), 720 P.2d 1229 (1986).

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JURISDICTION

Respondent contends that this Petition is jurisdictionally out of time. The question of estoppel was expressly decided by the Nevada Supreme Court in *Hicks v. BHY Trucking,* 99 Nev. 519, 665 P.2d 253 (1983). While the case remained to be tried following that decision, the State court's position on the federal issue was conclusive. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

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STATEMENT OF THE CASE

While Petitioner's statement of the case outlines a small portion of the evidence presented at trial, there was substantially more testimony relating to the reasons why a timely written notice of claim was not filed. Upon delivery, Respondent HICKS promptly discovered the damage to his machinery and verbally complained to one of the truck drivers who "said not to worry about it, they would take care of it." [T: Vol. I, pp. 21-22, 28.] The nature of the damage and its cause (torn tarps) were expressly noted in writing on both freight billings at that time. When contacted by telephone, PEARSON TRUCKING AND RIGGING disclaimed any responsibility and referred HICKS to BHY TRUCKING [T: Vol. III, pp. 243-244]. Dick Culy, a representative of BHY, told HICKS, "there would be an adjuster to come and appraise the damage of these machines, and that they would take care of it. . . ." [T: Vol. III, p. 245, ll. 9-12]. When no adjuster appeared, HICKS was repeatedly assured over a lengthy period of time by Culy that the adjuster was coming [T: Vol. III, pp. 245-248]. When HICKS was unable to complete the blank claim form requesting the estimated costs of repair, he telephoned Culy again:

> "I told him I couldn't do it, because I wasn't a machinery rebuilder. I had no idea of the cost. And he said, 'Don't worry about it. The machinery adjuster will help you with that.' "

[T: Vol. III, p. 245, ll. 23-26]. When asked at trial why he did not promptly file the written claim form, HICKS replied:

> "I was waiting for the adjuster to come and fill in on the forms how much it was going to be to remachine the surfaces that were rusted."

[T: Vol. IV, p. 371, ll. 8-10.]

Similarly, there was substantially more testimony than suggested by Petitioner regarding the foreseeability of HICKS' consequential business losses. There was testimony and evidence that both carriers knew they were moving an operating machine shop business as opposed to merely some generic machinery. [T: Vol. II, p. 155; Vol. II, pp. 214-216; Vol. IV, pp. 408-410; Vol. VI, p. 661.] A PEARSON agent had also represented to HICKS that his company had experience in handling such important cargo. [T: Vol. II, p. 212.] Based upon this and other evidence at trial, HICKS contended that at the time the contract was made it was readily foreseeable that he would suffer business losses if the machinery was damaged. The factual questions generated by the arguably conflicting evidence were submitted to the jury and resolved against the carriers. [ROA: Vol. I, pp. 219-220.]

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ARGUMENT

I.

THE ISSUE OF ESTOPPEL OF AN INTERSTATE CARRIER ARISES ONLY UNDER THE MOST UNUSUAL FACTS, AND THOSE COURTS ACTUALLY PRESENTED WITH THE QUESTION HAVE REACHED TOTALLY UNIFORM CONCLUSIONS.

In its first opinion in this case, *Hicks v. BHY Trucking*, 99 Nev. 519, 665 P.2d 253 (1983) the Nevada Supreme Court held that an interstate carrier could be estopped under certain unusual circumstances from asserting the written claim requirement. In that opinion the Nevada court faced a question directly addressed by only a small number of cases. A review of the available authority demonstrates that the problem rarely arises factually and there is no conflict in the few decisions on point.

This Court has firmly established that waiver or estoppel to assert the terms of a bill of lading cannot be predicated upon the fact that the carrier failed to safely deliver the shipment as agreed in its contract, and the shipper therefore remains bound by the other terms of that contract under such circumstances. *Georgia, Florida & Alabama Railway Co. v. Blish Milling Co.*, 241 U.S. 190 (1915); *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209 (1931) (waiver or estoppel based upon the carrier's breach of contract would thwart the purpose of the Interstate Commerce Act to prevent preferences and discrimination in rates and service). This general rule is uncontroverted and regularly recited in many of the carrier case

In the *Martin* opinion, however, this Court expressly left open the question whether any other circumstances might justify use of the doctrine of estoppel. 283 U.S. at 222. Only in a small number of unusual cases have any courts found such special circumstances. The courts of this country have consistently demanded full compliance with the written claim requirement except in the rare instances where, after loss or damage to the shipment, the carrier acts in some additional manner to mislead the claimant and induce a failure to file a timely claim.

The few courts facing those extraordinary facts have uniformly and justly concluded that a carrier may not rely upon its own misconduct to avoid liability in such cases. *Lehigh Valley R. Co. v. State of Russia,* 21 F.2d 396 (2d Cir. 1927), *cert. denied,* 275 U.S. 571 (1927) (carrier erroneously advised claimant to file written notice in the wrong office); *Perini-North River Associates v. Chesapeake & Ohio Railway Co.,* 562 F.2d 269 (3d Cir. 1977) ("peculiar facts": carrier's clerk advised that claim was not needed and carrier deviated from standard procedures for notifying claimant of damages); *Union Carbide Corp. v. Consolidated Rail Corp.,* 517 F.Supp. 1094 (N.D. Ill. 1981) (carrier falsely advised shipper that shipment back enroute after derailment); *Peters v. United Van Lines, Inc.,* 82 Ill.App.3d 104, 402 N.E.2d 378 (1980) (carrier's driver induced acceptance of shipment by representation that location of missing goods was known and delivery was pending); *South Carolina Steel Corp. v. Southern Railway Co.,* 262 S. C. 543, 206 S.E.2d 828 (1974) (carrier erroneously advised claimant that exact amount of damages was required on claim form); *see, Miller v. Aaacon Auto Transport, Inc.,* 447 F.Supp. 1201 (S.D. Fla.

1978) (carrier misled shipper into believing that only information on her insurance coverage was required).

Each of these decisions reflects the view that the doctrine of estoppel can be used when it enhances the statutory purpose of the Carmack Amendment.[1] The test is whether permitting application of the doctrine to a given state of facts would open the door to a carrier discriminating among shippers contrary to law. *South Carolina Steel Corp. v. Southern Railway Co., supra,* 206 S.E.2d at 831. When a carrier misleads a shipper regarding the written claim procedures, these courts have unanimously agreed that estoppel is appropriate:

> "If the carrier be not estopped by its conduct in this case, it is readily apparent that a carrier could discriminate by giving correct information to one shipper as to proper procedure for timely filing of a claim, but give to a shipper, which it did not wish to pay, incorrect information thereabout misleading such shipper into failing to file a formal written complaint until it was too late."

Id. Each of these courts has implicitly recognized that the contrary view suggested by Petitioner would undermine the Carmack Amendment and open the door to potential abuse of the written claim restrictions.

While Petitioner perceives a conflict between the courts on the question, none of the decisions cited for the

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[1] This Court has held that a federal statute setting a time limitation upon exercise of a statutory right does not restrict the power of the federal courts to toll that statute of limitations under certain circumstances not inconsistent with the legislative purpose. *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 559 (1974).

opposing view involved misleading conduct by the carrier with respect to the claim procedures. While each of those decisions reiterated the general rule prohibiting waiver or estoppel based upon the carrier's primary breach of contract, none of those courts considered the question posed in the six unusual cases discussed above.

The decision of the Nevada Supreme Court in the first appeal in this case acknowledged that there was evidence suggesting the carriers induced the untimely claim by repeatedly promising HICKS the assistance of an adjuster to complete the written form. The court's application of estoppel conforms to the conclusions reached by each of the six courts considering analogous unusual circumstances. The problem is rare, the judicial decisions are uniform, and the results have justly enhanced the purpose of the Carmack Amendment. Petitioner has demonstrated no special and important reasons for the exercise of this Court's discretion to review on certiorari. Sup.Ct.R. 17.1.

II.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE SUFFICIENCY OF THE EVIDENCE ESTABLISHING DETRIMENTAL RELIANCE FOR ESTOPPEL.

The law of estoppel in Nevada does not differ from the principles cited in the Petition. *See, Southern Nevada Memorial Hospital v. State, Department of Human Resources,* 101 Nev. 387, 705 P.2d 139 (1985); *Lubritz v. Circus Circus Hotels, Inc.,* 101 Nev. 109, 693 P.2d 1261 (1985). By selecting two statements out of context from a lengthy trial, Petitioner seeks a review of whether the element of detrimental reliance was provn in this case. As

summarized above, there was substantial evidence that HICKS postponed filing of his claim on the carrier's representations that assistance was coming. To the degree such testimony was conflicting, there was a question for the jury.

"Whether respondents . . . are estopped depends upon the facts. Granting of the writ [of certiorari] would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

III.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE SUFFICIENCY OF THE EVIDENCE ESTABLISHING THE FORESEEABILITY OF SPECIAL DAMAGES.

Relying upon a limited selection of favorable testimony, Petitioner also seeks review of the evidence that lost business damages were foreseeable and within the contemplation of the parties to the contract. As noted above, there was ample evidence tendered by HICKS that the carriers were fully aware of the essential nature of the shipment and the inevitable consequences to the HICKS business if damage occurred. Foreseeability of particular damages at the time of a contract is essentially a question of fact largely dependent upon the circumstances of each case. *Hycel, Inc. v. American Airlines, Inc.*, 328 F.Supp. 190, 194 (S.D. Tex. 1971); *Daniel v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086 (1982).

Petitioner neglects to mention that this case was also submitted to the jury, without objection by the carriers,

on a negligence theory [ROA: Vol. II, pp. 267-270] under which a wrongdoer is liable for all the natural and probable consequences of his negligent act. *Atchison, T. & S.F. Ry. Co. v. Jarboe Livestock Commission Co.*, 159 F.2d 527, 530 (10th Cir. 1947). Regardless of the legal approach, this Court has repeatedly held that a writ of certiorari will not be granted to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 521, 537 (1957) (Frankfurter, J., dissenting).

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CONCLUSION

Where, after loss or damage to a shipment, a carrier acts in some additional manner to mislead the shipper so as to induce a failure to file a timely written claim, the several courts facing the question have uniformly concluded that the carrier may not rely upon its own misconduct to avoid liability. The Petitioner's effort to bring this question before this Court by way of this Petition is untimely, for the Nevada Supreme Court conclusively set forth its position on this issue some three years ago. Lastly, the remaining questions presented by the Petitioner involve the review of evidence or the inference to be drawn from the evidence, an inappropriate undertaking for this Honorable Court.

For these reasons, a writ of certiorari is unwarranted and the Petition should be denied.

RESPECTFULLY SUBMITTED this 7 day of NOVEMBER, 1986.

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